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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. [redacted] 20

NEPTUNE METER COMPANY,
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Petition for Writ of Certiorari	1
Opinions below	1
Jurisdiction	2
Statute involved	2
Statement of the Case	2
Questions presented	7
Specification of errors to be urged	7
Reasons for granting the writ	7
Conclusion	12
Appendix	13

CITATIONS

Cases:

E. I. du Pont de Nemours & Co. v. *NLRB,* 116 F. (2d) 388 (CCA 4th, 1940) Cert. Denied 313 U. S. 571 (1941) 9

Foote Bros. Gear & Machine Corporation v. *NLRB,* 114 F. (2d) 611 (CCA 7th, 1940), 311 U. S. 620 (1940), 121 F. (2d) 802 (1941) 9

May Department Stores Co. v. *NLRB,* 326 U. S. 376 (1945) 10, 11

NLRB v. *Cheney California Lumber Co.,* 327 U. S. 385 (1946) 11

NLRB v. *Clinchfield Coal Corporation,* 145 F. (2d) 66 (CCA 4th, 1944) 9

PAGE

NLRB v. *Express Publishing Co.*, 312 U. S. 426 (1941) 10, 11

NLRB v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815 (CCA 9th, 1942) 9

NLRB v. *Mall Tool Co.*, 119 F. (2d) 700 (CCA 7th, 1941) 9

NLRB v. *Pennsylvania-Greyhound Lines, Inc.*, 303 U. S. 261 (1938) 8, 9

NLRB v. *Youngstown Mine Corp.*, 123 F. (2d) 178 (CCA 8th, 1941) 9

Statutes:

Judicial Code, Section 240(a) As Amended (43 Stat. 938, 28 U. S. C. Sec. 347(a)) 2

National Labor Relations Act (49 Stat. 449, 29 U. S. C. §151, *et seq.*):

Section 7 ..... 2, 13

Section 8(1) 13

Section 8(2) 13

Section 10(d) 13

Section 10(e) 2, 14

Section 10(f) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Neptune Meter Company, respectfully prays that a writ of certiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on December 20, 1946 modifying and, as modified, enforcing an order of the National Labor Relations Board dated October 21, 1944.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 465-485) has not, as yet, been officially

reported. The findings of fact, conclusions of law and order (R. 1-24)* of the National Labor Relations Board (hereinafter referred to as the "Board") are reported in 58 N. L. R. B. 1240.

JURISDICTION

The decree of the Circuit Court of Appeals sought to be reviewed was entered on December 20, 1946 (R. 486). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (43 Stat. 938, 28 U. S. C. Sec. 347(a)) and Section 10(e) and (f) of the National Labor Relations Act (49 Stat. 454, 29 U. S. C. Sec. 160(e) and (f)).

STATUTE INVOLVED

The statute involved is the National Labor Relations Act. (49 Stat. 449, 29 U. S. C. Sec. 151 *et seq.*, hereinafter referred to as the "Act"). The pertinent provisions of the Act are set forth in an appendix.

STATEMENT OF THE CASE

The order of the Court below entered December 20, 1946 enforces an order of the Board dated October 21, 1944 requiring petitioner to "disestablish" a former organization of its employees known as Employees Representative

*The reference "(R.)" will be used to refer to the Record which has been filed with this petition in this Court. The reference "(IEA R.)" will be used to refer to the Record in the related case involving the Independent Employees Association, also filed in this Court.

Organization (hereinafter referred to as "ERO"). The Court's order was entered at the same time as its order in Case No. 905, *Neptune Meter Company* v. *National Labor Relations Board,* now before this Court on petition for a writ of certiorari, relating to an order of the Board dated March 6, 1946 requiring the petitioner to "disestablish" an organization known as Independent Employees Association (hereinafter referred to as "IEA").

The two cases, which are closely related, were consolidated for argument by the Court below, were heard and considered together and a single opinion was written covering both cases (R. 465-485). In view of the close connection and overlapping of the records in these cases, and the importance of the facts considered and passed upon by the Board subsequent to its order in this case, certain references will be made herein to the record in the case involving IEA (No. 905).

The present proceeding was commenced by the Board on June 8, 1944 upon a charge brought by United Electrical, Radio & Machine Workers of America, affiliated with the CIO, and hearings were held before a Trial Examiner of the Board in July 1944. At these hearings it was shown that commencing in 1919 and prior to passage of the Act, the Company had participated amicably with its employees in an organization known as the "Congress" which dealt with wages, hours and conditions of employment.

Following passage of the Act, the "Congress" was voluntarily disbanded by the Company. Mr. A. H. Ricketts, then Vice-President and Manager of the Company, appeared at a meeting of the "Congress" on August 1, 1935, read to the representatives present the pertinent sections of the new Act, and advised that the Congress "is therefore

discontinued" (R. 53-54, 67, 97-100, 104-105). The employees were informed that they might freely organize themselves as they chose and that the Company would permit them to hold meetings in the cloak room of the plant. The Board found, as stated by its Trial Examiner, that "since the Congress as such has been dissolved and there appears to be no likelihood of its reestablishment, no order will be herein recommended specifically directed against it" (R. 20).

The employees thereafter organized ERO which engaged in vigorous collective bargaining with the Company over a period of nine years (R. 224-230, 364-370). The Company at the time had no rule prohibiting use of its premises for meetings or its typewriters or other facilities by employees engaged in union activities, and the representatives of ERO made use of such facilities and were permitted to engage in such activities without loss of pay from the Company (R. 65-66, 90-91). Because of these facts and the circumstances that ERO followed the "Congress", the Trial Examiner found that the Company was dominating and assisting ERO and recommended its disestablishment (R. 20-21). The record disclosed no evidence at any time of Company hostility to other unions or of discrimination by management, foremen or supervisors against other unions. A union affiliated with the CIO conducted an active campaign and its pamphlets were distributed and posted about the plant without interference or objection by the Company (R. 400-401, 409-410). There was no evidence, and there was no findings to indicate that the Company had been guilty of any of the unfair labor practices specified in the Act other than its alleged assistance to ERO in violation of Section 8(2) of the Act.

The Trial Examiner's intermediate report, dated September 6, 1944, recommended that the Company withdraw all recognition from and post notices disestablishing ERO, and that it cease and desist from "dominating" ERO or any other labor organization, from giving effect to any contracts with ERO, or from "in any other manner" interfering with any of the rights of its employees under the Act (R. 22-23).

The Company received the Trial Examiner's report on September 12, 1944 (IEA R. 605), and voluntarily complied therewith on September 21st by formally withdrawing recognition from ERO, posting the required disestablishment notices, and advising the Regional Director of the Board of its compliance (IEA R. 605). After the Company had elected not to contest the Trial Examiner's report and had disestablished ERO, the Board entered its formal order (R. 1-3) and the Company, to avoid any future question as to its compliance, again posted notices and observed the prescribed formula of disestablishment (IEA R. 613). The Board's order was substantially identical with that recommended by the Trial Examiner except that the blanket cease and desist provisions of Section 1(c) were changed to read as follows:

> "1. Cease and desist from:
>
> * * * * * *
>
> (c) In any other manner interfering with, restraining or coercing its employees in the exercise of the rights to self-organization, to form labor organizations, to join or assist United Electrical, Radio and Machine Workers of America, affiliated with the C. I. O., or any other labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activi-

ties, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

The Board did not then seek court enforcement of its order and did not at any time charge petitioner with noncompliance, but on March 22, 1945 brought a new proceeding which charged similar violations of Section 8(2) of the Act and which has resulted in the order in the related petition for certiorari now before this Court (No. 905). Upon the record in that case, which included the complete findings of the Board in the present case (Board's Exhibit 2, IEA R. 471-493), the Trial Examiner made findings (adopted by the Board) showing that petitioner had disestablished ERO (IEA R. 696) and that ERO had, in fact, held its last meeting on July 19, 1944 (IEA R. 685) and was not an existing labor organization (IEA R. 679). He declined to recommend any action against ERO and the Board made no order with respect to ERO. He did recommend a blanket cease and desist provision similar to that contained in Section 1(c) of the order in this case (IEA R. 698-699). In its exceptions to the Intermediate Report, petitioner excepted specifically to the inclusion of this paragraph (IEA R. 642-643), and the Board, after due deliberation, on March 6, 1946, issued its order which eliminated such provision.

No enforcement proceedings were sought in the present case until after petitioner and the IEA had filed petitions to review the Board's order of March 6, 1946 in the IEA case and after almost two years had passed since the hearing in this proceeding. The Board then brought the entire record in the present case before the Circuit Court of Appeals on June 6, 1946 by means of a petition for enforcement of its order of October 21, 1944 (R. 441-444). The

Court below, on December 20, 1946, entered its order over the objections of petitioner enforcing that order with the exception of the requirement for posting notices of disestablishment (R. 486-487).

THE QUESTIONS PRESENTED

1. Whether the court below erred in decreeing enforcement of an order of the National Labor Relations Board containing a broad provision enjoining petitioner from violating any of the provisions of the Act in a case where the Board found only that petitioner had violated Section 8(2) of the Act (amounting to a technical violation of Section 8(1) of the Act) and found no violations or likelihood of violations of other provisions of the Act.

2. Whether the court below erred in failing to hold that in the light of the record, extraordinary circumstances existed justifying petitioner's failure to raise objections before the Board prior to proceedings to enforce the Board's order in the court.

3. Whether the court below erred in decreeing enforcement of an order of the Board directing the disestablishment of a labor organization where petitioner had voluntarily disestablished such organization prior to the time the Board's order was made, where the Board subsequently found that such organization had been disestablished and was no longer in existence, and where more than two years had passed since the Board's order was issued.

Specification of Errors to be Urged

The Circuit Court of Appeals in affirming the order of the Board erred in its rulings on each and all of the foregoing questions.

REASONS FOR GRANTING THE WRIT

I.

The impelling reasons which call for the exercise by this Court of its powers of review in the related case (No. 905) and which have been set forth in the petition filed in that case likewise call for the granting of a writ of certiorari here. The court below has heard the two cases together and reached its decision upon a joint consideration of the record in both cases. In order to pass upon the correctness of the decision of the Circuit Court of Appeals in the related case, it is essential that this case should be brought before this Court for review.

II.

A further question of importance arises from the failure of the court below to dismiss the petition for enforcement on the ground that the proceeding is moot. In so holding the court below has relied upon the decision of this Court in *NLRB* v. *Pennsylvania-Greyhound Lines, Inc.*, 303 U. S. 261 (1938) and has misapplied and extended the holding in that case to a situation to which it has no proper application.

In the *Pennsylvania-Greyhound* case, *supra*, this Court held that an order of disestablishment was not moot when entered against an organization being dominated by the Company at the time the Board's order was made, although subsequent to the entry of the Board's order, an election had been held and another union certified. In the present case the organization ordered to be disestablished had

passed out of existence and had been entirely dissolved by the Company at a time prior to the issuance of the Board's order. In such circumstances, courts of other circuits have held that there is no purpose to be served in "whipping the corpse" and that they will refuse to be party to a futile proceeding.*

In this case, moreover, unlike the *Pennsylvania-Greyhound* case, the circumstances which might have justified the order in 1944 have entirely changed and the Board itself has found that the conditions which called for that order no longer exist and has entered an entirely new order applicable to the changed state of facts. The Court below, by enforcing that order in December 1946, has departed from the ordinary rule against the judicial determination of moot questions to an extent unjustified by the holdings of this Court.

III.

The refusal of the court below to strike from the Board's order the blanket injunctive provision of Section 1(c) thereof (*supra*, page 5) appears to have been based upon a misinterpretation of the decisions of this Court.

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*E. I duPont de Nemours & Co. v. NLRB, 116 F. (2d) 388, 401 (C.C.A. 4th, 1940) Cert. Denied 313 U. S. 571 (1941);

NLRB v. *Hollywood-Maxwell Co.*, 126 F. (2d) 815 (C.C.A. 9th, 1942);

Foote Bros. Gear & Machine Corporation v. *NLRB*, 114 F. (2d) 611 (C.C.A. 7th, 1940), 311 U. S. 620 (1940), 121 F. (2d) 802 (1941);

NLRB v. *Clinchfield Coal Corporation*, 145 F. (2d) 66 (C.C.A. 4th, 1944);

NLRB v. *Mall Tool Co.*, 119 F. (2d) 700 (C.C.A. 7th, 1941);

NLRB v. *Youngstown Mine Corp.*, 123 F. (2d) 178 (C.C.A. 8th, 1941).

This provision is practically identical with that which this Court ordered stricken out in *NLRB* v. *Express Publishing Co.,* 312 U. S. 426 (1941) and *May Department Stores Co.* v. *NLRB,* 326 U. S. 376 (1945). In so holding this Court, in the *Express Publishing Co.* case, *supra,* stated, at page 433:

> "It is obvious that the order of the Board, which, when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct."

The reasons behind the above decisions of this Court apply directly to the case at bar where there is no finding by the Board of Company hostility to unions nor that there has been or may reasonably be expected to be violations of the Act or any unfair labor practices other than the violation of Section 8(2) of the Act. These are circumstances under which this Court held that a company should not be subjected for an indefinite future time to possible contempt proceedings under an order of such broad scope.

The court below gave no reason for its refusal to correct the Board's order, but such refusal appears to have been based upon the argument of the Board that the Company's failure to urge this objection before the Board precluded its consideration by the court under the holding of

this Court in *NLRB* v. *Cheney California Lumber Co.*, 327 U. S. 385 (1946). In view of the special and extraordinary circumstances of this case, there was no justification for an extension of the holding in the *Cheney Lumber* case, *supra,* to the present situation.

Unlike the *Cheney Lumber* case, *supra,* this is a case in which the failure to raise the objection before the Board was attributable to an honest compliance on the part of the Company with the Board's recommendations. There was no reason to suppose, when the Company made such a choice, that it was jeopardizing its rights or subjecting itself to possible contempt of court for an indefinite time in the event it should in some way violate a blanket injunction of the type which this Court had up until that time held to be illegal. Moreover, the particular provision here enforced appeared for the first time in a form different from that recommended by the Trial Examiner, and there is no provision in the rules of the Board for making exceptions to a final order of the Board after it has been issued. In addition, there is the important and distinguishing fact in this case that the Board itself in a subsequent proceeding found no reason to use a blanket provision of this type and failed to follow the recommendation of its Trial Examiner that such a provision was necessary to effectuate the policies of the Act.

In the exceptional circumstances of this case, the enforcement by the Court below of Section 1(c) of the Board's order was unjustified under the *Cheney Lumber* case, *supra,* and was a departure from the holdings of this Court in the *Express Publishing* case, *supra,* and the *May Department Stores* case, *supra,* which should be reviewed by this Court.

CONCLUSION

WHEREFORE, for the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

NEPTUNE METER COMPANY,
Petitioner

By EDWARD L. COFFEY,
Counsel for Petitioner

January 17, 1947

APPENDIX

The pertinent provisions of the National Labor Relations Act (49 Stat. 449, 29 USC § 151, et seq.) are as follows:

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interefere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6(a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

* * * * * * * *

Sec. 10. (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with

or without back pay, as will effectuate the policies of this Act. * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order * * *. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *"